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No. 80-2093

In the Supreme Court of the United States

OCTOBER TERM, 1980

SEA-LAND SERVICE, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Attorney General has authority to petition for review of an order of the Federal Maritime Commission under the Administrative Orders Review Act ("Hobbs Act"), 28 U.S.C. 2344.

2. Whether such a petition presents a justiciable case or controversy.

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OPINIONS BELOW

The opinion of the court of appeals panel (Pet. App. 1a-81a) and the order of the court of appeals en banc vacating the panel judgment (Pet. App. 92a-93a) have not been reported. The order of the Federal Maritime Commission (Pet. App. 82a-90a) is not yet officially reported.

JURISDICTION

The judgment of the court of appeals panel was entered on December 19, 1980. The order of the court of appeals denying petitioner's request for

rehearing, granting the suggestion of the United States for rehearing en banc, and vacating the panel judgment was entered on March 13, 1981. The petition for a writ of certiorari was filed on June 10, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Sea-Land Service, Inc. was one of a group of international ocean carriers which requested that the Federal Maritime Commission extend its approval under Section 15 of the Shipping Act of 1916, 46 U.S.C. 814, of an agreement (Agreement No. 10140-8) permitting the fixing of rates charged for shipping goods from United States ports on the Gulf of Mexico to the United Kingdom. Approval by the Commission of such an agreement confers immunity from the federal antitrust laws. 46 U.S.C. 814; *FMC* v. *Pacific Maritime Ass'n*, 435 U.S. 40, 45 (1978). The agreement in question applied whether the goods were shipped by sea alone or partly by sea and partly by land (see Pet. App. 4a-6a, 83a).

The Department of Justice protested the extension of the agreement on the grounds that the Commission's statutory authority was limited to agreements pertaining exclusively to transportation by sea; that the agreement at issue should have been disapproved under Section 15 as "contrary to the public interest" because of its anticompetitive nature; and that approval of the extension necessitated a full evidentiary hearing (see Pet. App. 83a-84a). The Commission rejected the government's arguments and approved the extension without a hearing (Pet. App. 82a-90a).

2. The United States petitioned under the Administrative Orders Review Act ("Hobbs Act"), 28

U.S.C. 2344, for review of the Commission's decision by the United States Court of Appeals for the District of Columbia Circuit. Petitioner and several other affected parties intervened and challenged the authority of the United States to file such a petition. Rejecting intervenors' arguments, a panel of the court of appeals unanimously held that the United States is a "party aggrieved" within the meaning of the Act, 28 U.S.C. 2344 (Pet. App. 10a-18a); that the Act, construed in light of its purpose, structure, and legislative history, authorized the Attorney General to seek judicial review (Pet. App. 18a-31a); and that the petition presented a justiciable case or controversy (Pet. App. 31a-33a).[1] By a divided vote, the panel also upheld the jurisdiction of the Commission to approve the agreement (Pet. App. 33a-52a, 64a), but then unanimously voted to remand the case because the Commission had failed to hold an adequate hearing (Pet. App. 52a-64a).

A suggestion for rehearing en banc filed by the United States on the issue of the Commission's jurisdiction was granted (Pet. App. 92a). Sea-Land's petition for rehearing and suggestion for rehearing en banc on the question of the United States' authority to seek review were denied (Pet. App. 91a-92a). The court of appeals has since scheduled the case for argument en banc on December 10, 1981, on the issues of Commission jurisdiction and mootness.

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[1] Another panel of the District of Columbia Circuit subsequently relied on the decision in this case in holding that the United States has authority to seek judicial review of a Commission decision. *United States* v. *FMC*, No. 79-1325 (D.C. Cir. Dec. 29, 1980) (Pet. App. 98a-121a).

ARGUMENT

The court of appeals correctly decided that the United States was entitled to petition for judicial review in this case, and the court's decision conflicts with no decision of this Court or of any court of appeals. The petition presents no issue warranting further review.

1. Petitioner contends that the Hobbs Act does not authorize the United States to file a petition for review. Its argument, however, is not supported by the language, structure, or legislative history of the Act.

28 U.S.C. 2344 permits the filing of a petition by "[a]ny party aggrieved" by an order of one of the covered agencies. As the court of appeals found in its thorough and well-reasoned opinion, the United States was an aggrieved party in this case because the Commission's order arguably interfered in an unlawful manner with the Justice Department's responsibility for enforcing the antitrust laws (Pet. App. 12a-18a).

The structure of the Hobbs Act also fails to support petitioner's argument. It is true that Act provides that a petition for review is an "action * * * *against* the United States,"[2] 28 U.S.C. 2344 (emphasis added), and that the Attorney General is to represent "the interests of the Government." 28 U.S.C. 2348. However, the affected agency and "any party in interest" before the agency may appear as of right by their own counsel, and the Attorney General may not dispose of the case over their objection. Thus, as the court of appeals held (Pet. App. 18a-

[2] Fed. R. App. P. 15(a) modified this portion of the Act by providing that the agency is to be named as respondent and that "[t]he United States shall also be deemed a respondent if so required by statute, even though not so designated in the petition."

19a), these provisions do not evidence an intent to bar the United States from filing a petition for review, for they neither require the Attorney General to defend agency orders nor preclude an independent agency defense.

Petitioner, however, relies chiefly upon the legislative history of the Hobbs Act and two predecessor statutes which provided for judicial review of certain agency orders. The first of these was the Commerce Court Act, ch. 309, 36 Stat. 539 (amended 1913), which permitted parties aggrieved by orders of the Interstate Commerce Commission to petition for review by the Commerce Court. Whereas such actions had previously been brought against the ICC and defended by its own counsel, the Commerce Court Act required that petitions be brought against the United States and provided that in all such cases "the Attorney-General shall have charge and control of the interests of the Government." Section 5, 36 Stat. 540.

Petitioner argues (Pet. 16) that the Commerce Court Act simply "substituted" the Department of Justice for the ICC, *i.e.*, it placed the Department in precisely the same position occupied by the ICC prior to its enactment. Since the ICC could not have sued itself, petitioner reasons (Pet. 17), Congress could not have intended to permit the filing of petitions for review by the Department. Petitioner then contends (Pet. 18-20) that this feature of the Commerce Court Act was incorporated into two successor Acts, the Urgent Deficiencies Act, ch. 32, 38 Stat. 208, 219 (repealed 1950) and the Hobbs Act, ch. 1189, 64 Stat. 1129 (codified at 28 U.S.C. 2341, *et seq.*).

Petitioner's argument is flawed, among other reasons, because the Commerce Court Act did not and was not intended to place the Department of Justice

in the same position previously held by the ICC. As noted, while the Commerce Court Act made the United States a party respondent and gave the Attorney General responsibility for and control of the government's interests in any court proceedings, it also gave the ICC the right to intervene and be represented by its own attorneys.[3]

Moreover, the conclusion which petitioner draws from its reading of the legislative history—that "under no circumstances may it [the Department of Justice] bring its own petition for review to set aside an agency order" (Pet. 15, 20)—is refuted by *United States* v. *ICC*, 337 U.S. 426 (1949), which held that the United States could bring just such an action under the Urgent Deficiencies Act, an enactment which, petitioner admits (Pet. 19), is similar to the Hobbs Act in all relevant respects. Petitioner suggests (Pet. 21, 25 n.20) that *United States* v. *ICC*, *supra*, is distinguishable because there the government acted in a "proprietary," rather than a sovereign, capacity. But not only is there no support for such a distinction in the legislative history of the Hobbs Act and its

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[3] Petitioner cites two statements in the legislative history (Pet. 16 & n.8, 18) to show that the Commerce Court Act simply "substituted" the Justice Department for the ICC. The first statement, 45 Cong. Rec. 5516 (1910) (remarks of Congressman Townsend), however, referred to an earlier bill, S. 6737, 61st Cong., 2d Sess. § 5, 45 Cong. Rec. 7275 (1910), which lacked the provision granting the agency's right to intervene and be represented by its own counsel. The second, which appeared in the minority conference report, merely stated that the United States had been substituted for the ICC "as the defendant," while noting in the same sentence that "the commission is permitted to intervene." S. Doc. No. 623, 61st Cong., 2d Sess. 22 (1910).

predecessors, the Court drew no such distinction in its opinion in *United States* v. *ICC, supra.*[4]

2. Petitioner also contends that the petition for review does not constitute a case or controversy within the meaning of Article III, Section 2 of the Constitution because the real parties in interest are two federal agencies, the Department of Justice and the Federal Maritime Commission.

This Court rejected a similar argument in *United States* v. *ICC, supra,* in which the Attorney General petitioned for review of an I.C.C. order financially adverse to the government as a shipper on the railroads. The Court looked to the real parties in interest and found that there was a justiciable controversy over "who is legally entitled to sums of money, the Government or the railroads." 337 U.S. at 430. In the present case, the actual dispute is between the Department of Justice and the ocean carriers, whose agreement, absent valid approval by the Federal Maritime Commission, violates the antitrust laws.

But even if the real parties in interest are the Department of Justice and the Commission, there was a justiciable controversy. The Commission is an independent agency which is "wholly disconnected from the executive department" and which implements the Shipping Act "as an agency of the legislative and judicial departments." *Humphrey's Executor* v. *United*

[4] Respondents Atlantic & Gulf/Panama Canal Zone Conference, *et al.*, raise an additional argument in their brief supporting the petition for certiorari (Br. 12-22), *viz.*, that the United States' petition in this case should be barred because the Shipping Act was intended to give the Federal Maritime Commission primary responsibility for determining shipping policy. Whatever validity this argument may have, it concerns the merits of the United States' petition in this case (an issue still before the court of appeals), rather than the United States' right to file any such petition.

States, 295 U.S. 602, 630 (1935) (Federal Trade Commission). The Attorney General in cases under the Hobbs Act represents the Executive Branch. See *United States* v. *San Jacinto Tin Co.*, 125 U.S. 273, 279-280 (1888). Therefore, the independence of the parties in this case is even clearer than in *United States* v. *Nixon*, 418 U.S. 683, 697 (1974), in which a justiciable controversy was found to exist despite the fact that the dispute was between the President and the special prosecutor, a subordinate official in the Executive Branch. In this case, as in *Nixon*, there is a justiciable controversy because the issues are "of a type which are traditionally justiciable," 418 U.S. at 697, quoting *United States* v. *ICC*, *supra*, 377 U.S. at 430, and arise in a setting which assures "concrete adverseness" of the parties. 418 U.S. at 697. As the court of appeals wrote, there is a justiciable dispute between the Department of Justice, as "the authorized and traditional advocate of antitrust policies in agency litigation," and the Commission, which "obviously has a role before this court as advocate of its own perception of the public interest" (Pet. App. 32a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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